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No. 98-388

In the

Supreme Court of the United States

October Term, 1998

RUSSELL H. VOLKEMA and LOIS J. VOLKEMA,
Petitioners,

v.

STATE OF MICHIGAN; DEPARTMENT OF NATURAL RESOURCES; and ROLAND HARMES, Director of Department of Natural Resources,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.6, petitioners Russell H. and Lois J. Volkema (Volkemas) hereby reply to the Brief of Respondents in Opposition (Opp. Brf.) filed by respondents State of Michigan, *et al.* (State), on November 4, 1998.

The petition for certiorari asks this Court to take up a question raised but left unanswered in *Lucas v. South Carolina Coastal Council*:[1] whether *Lucas'* categorical takings rule should apply when the government eliminates all private beneficial use of a discrete, independently viable segment of real property and effectively dedicates it to public use for wetlands preservation.

This case does not involve the denial of one specific use of the entire property, as in *MacLeod v. Santa Clara County*.[2] It does not involve a requirement for setbacks or buffer zones, as the State attempts to argue by analogy. Opp. Brf. at 6. It most certainly does not involve a contractual dispute such as that in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*,[3] relied on heavily by the State although that case involved no loss of economically viable use of any part of any property. As will be shown in greater detail below, there are no factual or procedural irregularities in this case and the serious conflicts among the state and federal courts on this important constitutional question continue to spread. This is the time for the Court to take up and resolve the question it left open in *Lucas*.

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[1] 505 U.S. 1003, 1016 n.7 (1994).

[2] 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985), cited in Opp. Brf. at 7, 14.

[3] 508 U.S. 602 (1993), cited in Opp. Brf. at 6, 9, 16.

I

THERE ARE NO FACTUAL OR PROCEDURAL IRREGULARITIES TO THIS CASE AND THE FEDERAL CONSTITUTIONAL ISSUE IS SQUARELY AND CLEANLY PRESENTED

At the outset of its Opposition, the State contends that this case involves "unique facts" and a "procedural posture" that are somehow inconducive to resolving the question presented for review. Opp. Brf. at 3. This claim turns out to be based on nothing more than the fact that the Michigan Supreme Court denied the Volkemas' petition for review with comments, rather than denying it without comment. *Id.* at 3-4. However, the precise form of the denial of the Volkemas' petition for review is inconsequential both with respect to this Court's jurisdiction and the fitness of the question presented for review. It is well-settled that an order denying discretionary review by a state's highest court, even though it includes commentary "relat[ing] to the merits or correctness of the judgment below," satisfies the finality requirement for a petition for certiorari to review the decision of the intermediate state court under 28 U.S.C. § 1257.[4]

The State seems to believe that this Court grants certiorari to review "controlling authority . . . in the State of Michigan" on the question presented in the petition for certiorari. Opp. Brf. at 3. This is, of course, erroneous. Certiorari is granted only to address the particular constitutional issue presented by the specific decision below. The fact that the Michigan Supreme Court may have committed analogous errors in *K & K Construction*, and so noted in its order denying review in the present case, has no bearing whatsoever on the fitness for review by *this* Court of the question presented in the petition for certiorari in *this* case.

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[4] Robert L. Stern, *et al.*, Supreme Court Practice § 3.12 (7th ed. 1993) (citing *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923)).

Similarly, the effect (if any)[5] of the Michigan Supreme Court's comments on the "precedential authority" of the decision below in the State of Michigan, Opp. Brf. at 4, is irrelevant either to this Court's jurisdiction or the fitness for review of the question presented. The decision below is published in the official reports, 542 N.W.2d 282 (1995), and stands as binding authority on trial courts in the State of Michigan. This Court has, in appropriate circumstances, granted certiorari and reviewed *unpublished* decisions of state appellate courts that had no precedential effect at all, because of the importance of the constitutional issues involved.[6] The ambiguous reservations

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[5] The State claims that the Michigan Supreme Court "expressly disavow[ed], at least in part," the analysis of the court below. Opp. Brf. at 4. In fact, the state high court commented:

> The Court of Appeals' analysis, particularly its reliance on *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (1994), is disavowed insofar as it is inconsistent with this Court's decision in *K & K Construction*.

Petition for Certiorari, Appendix (App.) A-1. However, petitioners have argued that *Loveladies Harbor* actually *conflicts* with the decision below (see Petition for Certiorari at 22-23; Reply Brief, *infra*, at 7-8). Thus, disavowing any purported *reliance* on that decision would be singularly irrelevant to the question presented by Petitioners to this Court. Other than the reference to *Loveladies*, neither the Michigan Supreme Court nor the State suggest any way in which the decision below might be inconsistent with *K & K Construction*, so the purported "express disavowal" was apparently without any practical effect.

[6] *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (certiorari granted to review unpublished disposition of California Court of Appeal). Interestingly, the state appellate court in *First English* had merely applied what was then the "controlling authority on the issue" in the State of California:

(continued...)

expressed by the Michigan Supreme Court in its order denying review in the present case should have no impact on this Court's decision to grant certiorari.

II

THERE IS A GENUINE AND GROWING SPLIT OF AUTHORITY AMONG THE STATES AND LOWER FEDERAL COURTS ON THE IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW PRESENTED BY THIS CASE

The State's Opposition seeks to downplay the serious conflicts among the state and federal courts identified in the petition for certiorari. Opp. Brf. at 11-15. In fact, these conflicts are spreading at an alarming rate. In a case decided after the petition was filed, but available to the State at the time it was preparing its Opposition, the Commonwealth Court of Pennsylvania has joined those courts in direct conflict with the decision below. In *Machipongo Land and Coal Co., Inc. v. Commonwealth of Pennsylvania*,[7] the Pennsylvania court denied summary judgment to the state on a takings claim alleging that environmental regulations had eliminated all use of discrete segments of land comprising 2%-8% of plaintiffs' total holdings. The rule adopted by the Pennsylvania court is virtually identical to the rule the Volkemas have urged on this Court in the present case: the relevant property interest for takings analysis is the discrete segment carved out by regulatory action, ***provided*** the plaintiff can affirmatively prove the following:

1. the regulated land had value prior to the regulation;

2. the regulated land has a separate use from the non-regulated contiguous parcel(s); and

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[6] (...continued)
the California Supreme Court's decision in *Agins v. City of Tiburon*, 598 P.2d 25 (1979), overruled by this Court in *First English*.

[7] 1998 WL 667670 (Pa. Commw.), as amended October 1, 1998.

3. the regulated land has been deprived of all economic benefit to the owner.[8]

By adopting the rule proposed by the Volkemas, the Pennsylvania court stands in stark conflict with the court below, adding to the growing nationwide dissention on the categorical partial takings issue.

This new conflict magnifies the significance of those conflicts previously identified in the petition for certiorari, none of which has been seriously called into question by the State's Opposition.

A. *Boise Cascade Corp. v. Board of Forestry* Was Decided on Federal Constitutional Grounds and Reached a Conclusion Precisely the Opposite of the Decision Below

The State's Opposition argues that *Boise Cascade Corp. v. Board of Forestry*[9] does not conflict with the decision below because it was decided on independent state grounds. Opp. Brf. at 11. However, the *Boise Cascade* opinion does not support such a claim. The federal Fifth Amendment takings question was both raised and decided in *Boise Cascade*:

> On February 1, 1993, plaintiff filed this inverse condemnation action in Clatsop County Circuit Court, alleging that the Board's application of its administrative rule constituted a "taking" under Article I, section 18, of the Oregon Constitution, ***and under the Fifth Amendment to the United States Constitution.***[10]

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[8] *Id.* at 7.

[9] 935 P.2d 411 (Or. 1997).

[10] *Id.* at 415 (emphasis added).

> Both this court ***and the United States Supreme Court*** have recognized that, under certain circumstances, a "temporary" taking of all economic use of a piece of property may constitute a "taking" under the pertinent provisions of the state ***and federal*** constitutions.[11]

The fact that the Oregon Supreme Court determined that the defendant Board's actions violated the Oregon Constitution *in addition to* creating a federal takings claim under the Fifth Amendment in no way compromises the fact that the state's highest court ruled on the basis of its interpretation of federal constitutional law.

The State also claims that *Boise Cascade* "did not directly address the relevant parcel issue." Opp. Brf. at 11. This is a curious assertion, since the Oregon Supreme Court was expressly called on to rule whether a Fifth Amendment takings claim could be set forth by allegations that environmental regulations had eliminated economically viable use of a discrete 56-acre segment of a 64-acre parcel.[12] Later in its Opposition, the State modifies its argument to: "there is no *direct discussion* of the relevant parcel issue." Opp. Brf. at 12 (emphasis added). By this, the State presumably means that the Oregon Supreme Court did not set off a section of its opinion with the heading, "Relevant Parcel Issue." But this is because this issue informs and underlies the bulk of the opinion; *Boise Cascade* has no meaning ***except in the context of the categorical partial taking issue***. Finally, the State complains that *Boise Cascade* did not "determinatively decide the relevant parcel issue," since the case had gone up from the granting of a demurrer. Opp. Brf. at 12. This misses the point of the conflict with the decision below. In Oregon, under *Boise Cascade*, plaintiffs are entitled to go to trial

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[11] *Id.* at 420, citing to *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (emphasis added)).

[12] *Id.* at 420.

on a takings claim alleging that regulations have deprived them of all economically viable use of a discrete segment of a larger parcel of property. In Michigan, under the decision below, they may not do so. In Oregon, plaintiffs who can prove up their claims at trial will be entitled to compensation under *Lucas*; in Michigan, they will not even have this opportunity, for under the opinion below such claims will be foreclosed as a matter of law. This is a genuine, fundamental conflict that cries out for resolution by this Court.

B. *Loveladies Harbor* Obviously Conflicts with the Decision Below

The State's Opposition asserts that there is no conflict between *Loveladies Harbor, Inc. v. United States*[13] and the opinion below. Opp. Brf. at 13-14. However, the essential conflict between these two cases is obvious. The *Loveladies* plaintiff owned a 51-acre parcel, out of which the government carved a discrete 12.5-acre segment to be dedicated to public use.[14] In the case at bar, the Volkemas own a 24.6-acre parcel, out of which the government carved a discrete 6-acre segment to be dedicated to public use.[15] In *Loveladies*, these facts were found to give rise to a taking;[16] in the case at bar, they were not.[17]

The State finds it dispositive that the remaining 38.5 acres in *Loveladies*, although still privately owned, had been

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[13] 28 F.3d 1171 (Fed. Cir. 1994).

[14] *Id.* at 1180-81.

[15] App. D-1.

[16] 28 F.3d at 1183.

[17] App. B-9.

"promised"[18] to another governmental entity, and seeks to distinguish the two decisions on that basis. Opp. Brf. at 13. However, like the State in the proceedings below, the Corps of Engineers predicated its defense in *Loveladies* on the argument that the entire 51 acres owned by the plaintiffs was the proper measure of the "parcel as a whole" for categorical takings analysis.[19] By rejecting that argument, the *Loveladies* court broke sharply with the rationale urged by the State of Michigan and adopted by the appellate court in the decision below. As Judge Sawyer pointed out in dissent, it is difficult to see any relevance of *Loveladies* to the majority opinion below, other than conflicting with it.[20]

Finally, this fundamental conflict was emphasized by the Michigan Supreme Court which, in its order denying the Volkemas' petition for review, disapproved precisely those portions of the decision below that purported to rely on *Loveladies*.[21]

C. The State's Opposition Highlights Additional Conflicts That Exist *Within* the Ninth Circuit, in Addition to the Conflict Identified in the Petition Between the Ninth Circuit and the Michigan State Courts

The State downplays the significance of the conflicting Ninth Circuit opinion in *American Savings and Loan Association v. County of Marin*,[22] suggesting that this case is of "dubious precedential value." Opp. Brf. at 14. However,

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[18] 28 F. 3d at 1181.

[19] *Id.* at 1180-81.

[20] App. B-13 (Sawyer, J., dissenting).

[21] App. A-1.

[22] 653 F.2d 364 (9th Cir. 1981).

American Savings is still good law in the Ninth Circuit. It has not been overruled, modified, or qualified by any subsequent opinion of that circuit. Indeed, the Michigan Supreme Court cited to *American Savings* in *Bevan v. Brandon Township*,[23] confirming that *American Savings* is still considered good law in the Michigan courts.

What the State actually demonstrates is that there is some dissention *within the Ninth Circuit itself* on the categorical partial taking issue, with at least one district court refusing to follow *American Savings*.[24] Contrary to the State's Opposition, *MacLeod v. Santa Clara County*,[25] cited in Opp. Brf. at 14, does not conflict with *American Savings*. Unlike *American Savings* or the case at bar, *MacLeod* involved the denial of one specific use of the entire property (timber harvesting), rather than the prohibition of *all* use of a discrete, identifiable segment of the land.[26] Thus, the dicta from *MacLeod* quoted in the State's Opposition has no bearing on the question presented by the current petition. At most, all the State has shown is that the disarray and confusion surrounding the categorical partial taking issue reach deep into the federal circuits themselves, as well as giving rise to conflicts among the circuits.

CONCLUSION

The applicability of *Lucas*' categorical takings rule to the regulatory deprivation of discrete, independently viable segments of real property is a pressing and important question of federal constitutional law. It is also the source of widespread conflicts, confusion, and disarray among the Fifth Amendment takings

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[23] 475 N.W.2d 37, 42 (1991).

[24] *See Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988), cited in Opp. Brf. at 15.

[25] 749 F.2d 541.

[26] *See id.* at 543-44.

decisions of the state and lower federal courts. For all of these reasons, and for the reasons stated in the petition for certiorari, Petitioners Russell H. and Lois J. Volkema respectfully pray that the petition be GRANTED.

DATED: November, 1998.

Respectfully submitted,

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